

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Charging Party,

v.

CALIFORNIA NURSES ASSOCIATION,

Respondent.

Case No. SF-CO-66-H

PERB Decision No. 1638-H

June 9, 2004

Appearance: Littler Mendelson by Robert Hulteng, Attorney, for Regents of the University of California.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Regents of the University of California (University) from a Board agent's dismissal of its unfair practice charge. The charge alleged that the California Nurses Association (CNA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by engaging in a sympathy strike.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters and the University's appeal. Based on the discussion below, the Board reverses the dismissal and remands this case to the Office of the General Counsel for further investigation.

¹HEERA is codified at Government Code section 3560, et seq.

BACKGROUND

The University and CNA are parties to a collective bargaining agreement (CBA), which expires on April 30, 2005. Article 36 of the CBA contains a no-strike clause stating, in relevant part:

A. During the term of this Agreement or any written extension thereof, the University agrees that there shall be no lockouts by the University. The Association, on behalf of its officers, agents, and members agrees that there shall be no strikes, stoppages or interruptions of work, or other concerted activities which interfere directly or indirectly with University operations during the life of this Agreement or any written extension thereof. The Association, on behalf of its officers, agents, and members, agrees that it shall not in any way authorize, assist, encourage, participate in, sanction, ratify, condone, or lend support to any activities in violation of this Article.
(Emphasis added.)

According to the charge, the current no-strike clause has remained the same since 1984. The University alleges that during negotiations in 1984, the University originally proposed a no-strike clause containing the following language:

During the term of this Agreement or any written extension thereof, the Association, on behalf of its officers, agents and members, agrees that there shall be no strikes, slowdowns, walkouts, work stoppages, refusal to perform assigned duties, sitdowns, sympathy strikes, sickouts, refusal to cross picket lines [Emphasis added.]

CNA allegedly rejected the University's proposed language because it was too long and complicated. Instead, CNA offered the following counter-proposal:

There shall be no strikes, lockouts, or other stoppages or interruptions of work during the life of this Agreement. All disputes arising under this Agreement shall be settled in accordance with the Grievance and Arbitration procedures herein.

The parties discussed the no-strike clause several times during negotiations. CNA eventually agreed to the language prohibiting, "strikes, stoppages, or interruptions of work." However, the University argues that it refused to limit the clause to such language and insisted on a

prohibition of other activities, such as sympathy strikes. In response, CNA agreed to add the phrase “other concerted activities” to the clause. According to the charge, CNA assured the University that the phrase “other concerted activities” included the activities that the University had listed in its original proposal. With this assurance, the University states that it agreed to the current language.

According to the charge, for eighteen years CNA never engaged in a sympathy strike unlike other bargaining units of the University. Then, on August 16, 2002, CNA sent written notice to the University of its intention to engage in a three-day sympathy strike in support of the University’s clerical and allied services employees exclusively represented by the Coalition of University Employees (CUE). The notice stated where picketing would take place and provided that bargaining unit members would return to work on August 29, 2002. On August 20, 2002, the University sent notice to CNA arguing that CNA’s intended sympathy strike was a violation of the parties’ CBA. Undeterred, CNA members began in a three-day sympathy strike in support of CUE on August 26, 2002.

DISCUSSION

The University argues that CNA’s sympathy strike violated the no-strike clause of the parties’ CBA, and thus, constitutes an unlawful unilateral change by CNA. An unlawful unilateral change by an employee organization constitutes an unfair practice. (HEERA sec. 3571.1(c).) Thus, the sole issue before the Board is whether the University has sufficiently alleged an unfair practice by CNA.² To determine if an unfair practice has been sufficiently alleged, the Board must first examine whether the parties’ CBA prohibits sympathy strikes.

²The University also asserts that the primary strike by CUE was an unfair practice and that CNA must “stand in the shoes” of CUE. However, this argument goes to the issue of whether CNA’s sympathy strike was protected, which is not before the Board.

The Board recently addressed this very issue in Oxnard Harbor District (2004) PERB Decision No. 1580-M (Oxnard). In Oxnard, the Board recognized that there is no common law prohibition against strikes by California public sector employees and their unions. (County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn. (1985) 38 Cal.3d 564 [214 Cal.Rpt. 424].) Accordingly, engaging in a sympathy strike constitutes an unfair practice only if prohibited by the applicable CBA. To determine whether sympathy strikes are prohibited by a CBA, the Board adopted the following standard set forth in Children's Hospital Medical Center v. Nurses Assn. (9th Cir. 2002) 283 F.3d 1188, 1192 [169 LRRM 2779] (Children's Hospital):

Since the Union's waiver of the employees' statutory rights must be clear and unmistakable, the extrinsic evidence must manifest a clear mutual intent to include sympathy strikes within the scope of the no-strike clause or else the clause will not be read to waive sympathy strikes. . . . A broad no-strike provision by itself is not sufficient to waive the right to engage in sympathy strikes if extrinsic evidence of the parties' intent does not demonstrate that the parties' [sic] mutually agreed to include such rights within the breadth of the no-strike clause. [Children's Hospital, at p. 1195, quoting Indianapolis Power, at p. 528; emphasis in original.]

In Oxnard, the employer argued that a general no-strike clause should be interpreted to include sympathy strikes, even where such strikes are not explicitly mentioned. However, the Board rejected this argument based on the holding in Children's Hospital. Significantly, the employer in Oxnard made no allegation, and proffered no extrinsic evidence, that the no-strike clause at issue was mutually intended to prohibit sympathy strikes.

In advancing this argument, the employer failed to offer any extrinsic evidence that the general no-strike clause at issue was mutually intended to also prohibit sympathy strikes. Accordingly, the Board dismissed the charge on the rationale in Children's Hospital. In contrast, the University in this matter asserts that both the language of the no-strike clause and the bargaining history behind that language support its contention that sympathy strikes are

prohibited by the CBA. Specifically, the University cites to the inclusion of the phrase “other concerted activities” in the no-strike clause. The University alleges that during bargaining the parties mutually agreed that this phrase included sympathy strikes. Because it contends that it provided extrinsic evidence to support its position, the University argues on appeal that the Board agent erred in dismissing its charge. The University asserts that the Board agent should have accepted its allegations as true for purposes of determining whether to issue a complaint.

In dismissing the charge, the Board agent found that the contract language at issue was identical to that in Children’s Hospital. As discussed above, this is not accurate. Rather, this case turns on the meaning of the phrase “other concerted activities.” The University argues that the language “other concerted activities” was mutually intended to prohibit sympathy strikes. If the University can provide evidence of such mutual intent, a complaint must issue.

ORDER

The Board REVERSES the Board agent's dismissal in Case No. SF-CO-66-H and REMANDS the case to the Office of the General Counsel for further investigation as to whether a complaint should issue.

Member Duncan joined in this Decision.

Member Whitehead’s dissent begins on page 6.

WHITEHEAD, dissenting: I respectfully dissent. The Public Employment Relations Board (PERB or Board) should affirm the Board agent's dismissal. PERB Regulation 32615(a)(5)¹ requires that a charge contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The amended charge with its conclusory allegations does not possess the required specificity to demonstrate the parties' mutual agreement that the phrase "other concerted activities" includes sympathy strikes. Thus, the charge did not state the "who, what, when, where and how" of the unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S; United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are insufficient to state a prima facie case.

The Regents of the University of California has had ample opportunity to state sufficient facts that demonstrate a prima facie case during the Board agent's investigation of the charge and should not be granted a "second bite of the apple." Remand in such a situation sets a dangerous precedent for knowledgeable parties to repeatedly refine their charges and unnecessarily prolong the dispute; this does not promote the development of harmonious and cooperative labor relations intended by the Higher Education Employer-Employee Relations Act section 3560. The charge should be dismissed.

¹PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.